No. 92-1373

In The

Supreme Court of the United States

October Term, 1992

CARROLL M. NORRIS and JOHNNIE L. NORRIS,

Petitioners,

vs.

B.R. HARBIN, A/K/A BOBBY RAY HARBIN; BETTY FRANKLIN HARBIN; RONALD DEWAYNE JONES; DEBBIE YVONNE HARBIN JONES; MARGENE ALLRED and JAMES D. ALLRED,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether or not Appellants have standing to raise federal, constitutional questions in the Supreme Court of the United States where the questions were not timely raised and not heard on the merits in the courts below.

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STATEMENT OF THE CASE

This case arose in the Circuit Court of Jefferson County, Equity Division, and was tried in June of 1991, on the central of issue of whether or not Harbin could prove that Ponderosa Drive, Adamsville, Alabama, is a public road. The trial court ruled that the evidence was sufficient to declare Ponderosa Drive a public road. No federal, constitutional questions were tried. Norris then filed a Motion for a New Trial and Other Relief which was

denied. This was Norris' first attempt to raise federal questions, and they were not heard on the merits.

Norris appealed without raising federal, constitutional questions to the Supreme Court of Alabama which issued an opinion affirming the trial court on August 14, 1992. Thereupon, Norris filed an application for rehearing on August 26, 1992, again attempting to raise federal questions. The application was overruled without written opinion on December 4, 1992.

Finally, the Alabama Supreme Court, on rehearing *ex mero motu*, issued a restyled opinion on January 22, 1993. However, the court did not rule on any federal questions. At no time did the Supreme Court of Alabama judge any federal, constitutional questions on the merits.

SUMMARY OF ARGUMENT

A careful reading of Appellants' brief on its face reveals that Norris did not timely raise federal questions in the courts below. Appellants admit that they raised no federal questions in the Circuit Court of Jefferson County, Alabama, until they submitted a motion for new trial, (denied) and none in the Supreme Court of Alabama until they filed an Application for Rehearing (denied). Hence, federal questions were never considered on the merits in the courts below. Long established precedent in the Supreme Court of the United States holds that federal questions not properly raised in the courts below will not be entertained. Norris lacks standing to bring federal questions before this Honorable Court.

ARGUMENT

Federal questions were not timely raised and not heard on the merits in the courts below.

A careful reading of Appellants' brief on its face reveals that Norris did not timely raise federal questions in the courts below. Norris states that

> . . . the essential federal question was raised in the NORRIS *Motion of Defendants Norris for a New Trial and Other Relief* . . . (p. 30).

Hence, Norris admits that they did not raise federal questions in their trial court (Circuit Court of Jefferson County, Alabama), pleadings but waited *until the trial was over* and then attempted to raise them in a motion for new trial. Appellants waited until after the issues had been defined and evidence had been heard before raising federal questions. The trial court heard no constitutional questions on the merits.

Regarding presentation of the case to the Supreme Court of Alabama, Norris states that they raised federal questions in their Application for Rehearing (pp. 35-37) which was denied without written opinion. Clearly, Norris by their own admission did not raise federal questions in the Alabama Supreme Court until *after the court had considered the appeal and rendered an opinion*. Even the court's rehearing *ex mero motu* makes no reference to any federal questions. The Alabama Supreme Court also heard no constitutional questions on the merits.

A distinct pattern is evident that Norris was not in the habit of raising federal questions either in the trial court or the state supreme court until these courts had already considered the issues placed before them and

rendered decisions. The federal questions were untimely raised and unheard on the merits in either forum.

This Honorable Court has a well-established precedent that federal questions not properly raised below will not be considered:

> Supreme Court would not consider argument made in brief, where such point was not made in complaint.
> *Pennsylvania Railroad Co. v. Public Utilties Commission of Ohio*, 56 S. Ct. 687, 298 U.S. 170 (1936).
>
> Ground of defense not urged in trial court may not be urged on appeal.
> *United States v. LeBaron*, 60 U.S. 73, 19 How. 73 (1907).
>
> Only the constitutional issues raised in lower courts are before Supreme Court on appeal.
> *Shelley v. Kraemer*, 68 S. Ct. 836, 334 U.S. 1 (1948).
>
> An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for new trial after verdict.
> *American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U.S. 284 (1856).
>
> Objections not taken at usual stage of proceedings or prominently presented on face of record, but which may be sprung on a party after an apparent waiver of them by his adversary and after trial on merits are not favored by the reviewing court but should be entertained in obedience only to the strictest requirements of the law.
> *Roach v. Hulings*, 41 U.S. 319, 16 Pet. 319 (1842).

Objection that jury panel from which jury was selected was improperly drawn was made too late where made for first time in motion for new trial.
Francis v. Southern Pacific Co., 68 S. Ct. 611, 332 U.S. 445 (1948).

An argument as to constitutionality of a state statute not made to state courts nor reserved in notice of appeal to the Supreme Court could not be considered on appeal to the Supreme Court. Supreme Court Rules, rules 10(2), 15(1) (c) (1), 28 U.S.C.A.
Head v. New Mexico Board of Examiners in Optometry, 83 S. Ct. 1759, 34 U.S. 424 (1963).

It is necessary to the jurisdiction of the Supreme Court under US Rev Stat 709, USC title 28, 344, that the title, right, privilege, or immunity relied on be specially set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed.
Schuyler National Bank v. Bollong, 150 U.S. 85, 14 S. Ct. 24 (1893).

When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary.
Exxon Corp. v. Eagerton, 462 U.S. 176, 103 S. Ct. 2296 (1983).

It is not sufficient to confer jurisdiction on the Supreme Court, that a Federal question is suggested in the state court on a petition for

rehearing. Such petition is no part of the record on which the judgment rests.
Lagrange v. Chouteau, 29 U.S. 287, 4 Pet. 287 (1830).

For the purpose of determining whether the United States Supreme Court will review a federal question that is raised in an appeal from a decision of a state court, it will be assumed that when the highest state court failed to pass upon the federal question, the omission was due to want of proper presentation in the state court, unless the aggrieved party in the Supreme Court can affirmatively show the contrary.
Board of Directors of Rotary International v. Rotary Club of Durate, 481 U.S. 537, 107 S. Ct. 1940 (1987).

Before the United States Supreme Court will consider, on review, a federal question arising from a state case, the federal question must first be presented to the state courts for decision.
Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430 (1990).

A privilege or immunity under the Constitution of the United States cannot be set up in the Supreme Court of the United States under U.S. Rev. Stat. 709, USC title 28, 344 when suggested for the first time in a petition for rehearing after judgment.
Chappell v. Bradshaw, 128 U.S. 132, 9 S. Ct. 40 (1888).

A Federal question is raised too late for writ of error to a state court when presented on application to the Supreme Court for a rehearing.
Capital National Bank v. First National Bank of Cadiz, 172 U.S. 425, 19 S. Ct. 202 (1898).

A writ of error will not lie to a state court on the ground that a Federal question is involved where such question was first raised in the state court in the petition for rehearing.
Kansas City Star Co. v. Julian, 215 U.S. 589, 30 S. Ct. 406 (1909).

A Federal question first raised on motion for rehearing in a state appellate court comes too late to serve as the basis of a writ of error from the Federal Supreme Court.
Mergenthaler Linotype Co. v. Davis, 251 U.S. 256, 40 S. Ct. 133 (1920).

An attempt to raise a question of repugnancy of a state statute to the Federal Constitution by petition for rehearing of the final decision of the highest court of the state is too late to permit a review of the decision by the Supreme Court of the United States, on writ of error.
Rooker v. Fidelity Trust Co., 261 U.S. 114, 43 S. Ct. 288 (1923).

An attempt to raise Federal question in a state court after judgment, upon a petition for rehearing, does not furnish a basis for review by the Supreme Court of the United States unless the state court actually entertains the question and decides it.
Herndon v. Georgia, 295 U.S. 441, 55 S. Ct. 794 (1935).

A Federal question cannot be raised for the first time after final decision in the highest court of the state, for the purpose of supporting a writ of error from the Supreme Court of the United States.
Bobb v. Jamison, 155 U.S. 416, 15 S. Ct. 357 (1894).

> Where no title, right, privilege, or immunity of a Federal nature was set up and claimed, nor the validity of any Federal statute denied in the state court, nor the validity of any state statute challenged, prior to the judgment of affirmance in the highest court of the state, on the ground of its repugnance to paramount Federal law, the Supreme Court is not justified in taking jurisdiction.
> *Beals v. Cone*, 188 U.S. 184, 23 S. Ct. 275 (1903).

In sum, the federal questions Appellants attempt to raise in this Honorable Court were not timely raised or adjudicated in the Circuit Court of Jefferson County, Alabama, or the Supreme Court of Alabama. Norris therefore lacks standing before the Supreme Court of the United States.

CONCLUSION

Appellants Norris failed to raise timely federal questions before the trial court and the Supreme Court of Alabama. Neither court heard federal questions on the merits. Norris now lacks standing to raise federal questions before the Supreme Court of the United States, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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